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GAO

United States
General Accounting Office
Washington, D.C. 20548

Resources, Community, and
Economic Development Division

B-241737

December 3, 1990

The Honorable Claiborne Pell
Chairman, Committee on
Foreign Relations
United States Senate

Dear Mr. Chairman:

As you know, the United States government has long been dissatisfied with the low level of compensation permitted by international agreements governing airlines' liability for injury or death suffered in international aviation accidents. Under current agreements to which the United States is a party, an airline is liable for a maximum of only $75,000 per passenger. Although victims or their survivors can sue for higher damages, court cases can last for several years, in part because claimants have to prove that the airline was at fault. To address problems concerning the low liability limits, the member states of the International Civil Aviation Organization (ICAO) negotiated a new agreement, Montreal Aviation Protocol No. 3. It is now before the United States Senate for ratification, accompanied by a plan to provide supplemental compensation for victims of international aviation disasters.

In response to your request and subsequent arrangements with your office, we examined how Protocol No. 3 and its companion supplemental compensation plan would affect the timeliness of compensation, the cost of securing compensation, and the level of compensation for victims of international aviation accidents. We also examined how the Protocol and the plan would affect Americans' access to U.S. courts and whether the Protocol might jeopardize the safety of international air travel. We compared how the liability system would work under three scenarios: if the Protocol were adopted, if the Protocol were rejected and current international agreements remained in effect, or if no international agreements existed. This report expands on our testimony before your committee on June 19, 1990.[1]

[1] International Aviation: Implications of Ratifying the Montreal Aviation Protocols (GAO/T-RCED-90-83).

Results in Brief

Overall, American victims of international aviation accidents and their families would be better compensated under Protocol No. 3 and the proposed supplemental compensation plan than they would be if the current international agreements remained in effect or if no international agreements existed. The Protocol and the plan would increase the timeliness of compensation for claimants by eliminating their need to prove that the airline was at fault before they could receive compensation and by providing incentives for the airlines to settle claims promptly. Claimants' costs of securing compensation would be reduced because, for the reasons cited above, most cases would be settled without a trial and attendant costs. Should cases go to trial because the amount of damages is in dispute, courts would be permitted to impose claimants' legal costs on airlines. The Protocol and the plan would also increase the level of compensation for claimants by significantly raising the airlines' liability limit, providing funds for additional compensation of victims, and decreasing the proportion of the damage award that claimants pay for legal costs.

Furthermore, the Protocol and the plan would increase the likelihood that Americans could have their lawsuits for damages tried in U.S. courts if compensation offers are unsatisfactory. As a result, U.S. standards of compensation would be used in determining damage awards.

Finally, implementation of Protocol No. 3 is not likely to jeopardize airline safety. Adverse economic impacts due to aviation accidents and government safety regulations—not fear of litigation—are the primary incentives for airlines to operate safely.

Background

The 1929 Warsaw Convention treaty[2] established the foundation for current international agreements governing airlines' liability for the international transportation of passengers, baggage, and cargo. Adopted by 123 countries, including the United States, the Convention, among other things, limits airlines' liability in most cases of injury or death to about $10,000 per passenger. Subsequent international agreements have revised this limit. The airlines' current maximum personal liability limit for injury or death suffered in flights to or from the United States, adopted in 1966, is $75,000.

[2]Convention for the Unification of Certain Rules Relating to International Transportation by Air, Warsaw, Oct. 12, 1929.

Victims or their survivors can obtain compensation in excess of the liability limit if they can demonstrate willful misconduct by the airline. Proving willful misconduct can be a lengthy, difficult, and expensive process. Since the Convention went into effect in 1933, claimants have obtained U.S. court judgments of willful misconduct for personal injury or death in only nine cases (as of June 1990).

Protocol No. 3 was introduced to update the current international agreements governing airlines' liability. The Protocol prescribes that airlines are liable for the death and injury of passengers regardless of fault. It increases the liability limit to 100,000 SDR[3] per passenger (approximately $143,000), which cannot be exceeded because the Protocol deletes the provisions of the Warsaw Convention that allow claimants to recover additional compensation from the airlines by proving willful misconduct. The Protocol further permits countries to establish plans supplementing the compensation of victims, as long as these plans do not impose an additional liability on airlines. It expands the bases for determining court jurisdiction over accident claims and encourages airlines to settle promptly.[4]

The Protocol does not require countries to implement plans to supplement compensation for claimants; it simply allows countries to do so. Similarly, the Protocol does not prescribe the level of compensation or limit the extent of coverage to be provided by a supplemental compensation plan.

The current U.S. plan, dated March 20, 1990, and developed by the airline industry according to Department of Transportation (DOT) guidelines, supplements the compensation of provable economic and non-economic losses[5] by up to $500 million per aircraft for each accident. As currently proposed, funds for the plan are to come from a surcharge on tickets sold in the United States for international flights originating

[3]The value of the SDR, an international reserve asset developed by the International Monetary Fund, is based on the average worth of the world's five major currencies (U.S. dollar, British pound sterling, French franc, West German mark, and Japanese yen). The dollar equivalent of the SDR fluctuates. As of October 30, 1990, its value was $1.433907.

[4]If a dispute over compensation is decided by a court judgment, the Protocol requires that the airline pay the legal expenses of the claimant if, within 6 months of having received written notice of the claim, the airline did not offer a settlement that was at least equal to the final compensation awarded by the court.

[5]Economic losses include lost income and the imputed value of lost household services. Non-economic losses include mental anguish, pain and suffering, and loss of companionship.

here—the amount of the surcharge to be determined by competitive bids from potential plan contractors. According to the drafters of the plan, the per accident limit would be flexible and could be raised if circumstances warranted. Both the plan and the contractor of the plan must be approved by the Secretary of Transportation. Like the Protocol, the plan promotes the prompt settlement of claims.[6]

The DOT guidelines call for the supplemental compensation plan to cover U.S. citizens and permanent residents traveling on international flights regardless of whether they have paid the surcharge. Protocol No. 3 and the guidelines also dictate that the plan must cover foreigners who pay the surcharge on departure from the United States. However, the current draft plan does not cover Americans on a flight between foreign countries that have not ratified Protocol No. 3. The draft also does not cover Americans on a round-trip or one-way flight to the United States from a country that is not a party to Protocol No. 3. To remedy this situation, on June 15, 1990, DOT requested that the drafters of the plan revise its provisions to cover these passengers.

Protocol No. 3 Would Reduce the Time Required to Compensate Accident Victims

The Protocol and the proposed supplemental compensation plan would expedite compensation because claimants would be required to prove only the amount of the losses that they suffered. They would not be required to prove that the airline involved was at fault. If no settlement is reached with the airline or the contractor of the supplemental compensation plan, claimants can sue to obtain more acceptable compensation for damages. However, under Protocol No. 3, the airline and the contractor of the supplemental compensation plan would have an incentive to settle claims quickly because they would be liable for the claimant's legal expenses if their settlement offers are not reasonable and prompt.

Under current international agreements, resolving aviation accident cases can be a lengthy process, especially when disputes over compensation go to trial. According to a study by the RAND Corporation analyzing aviation accident settlements between 1970 and 1984—the latest years for which comprehensive data are available—Americans whose claims were subject to current international agreements had to wait, on average, about 2 years to obtain compensation if their cases were settled

[6]The plan requires that the contractor pay the legal expenses of the claimant if the contractor does not offer a reasonable settlement within 90 days of whichever of the following occurs later: (1) the contractor receives a notice of the claim or (2) the airline makes payment equal to its limit of liability.

before trial.[7] Once they went to trial, even if a settlement was reached before a verdict, they had to wait, on average, more than 7 years. The maximum length of time for receiving compensation was almost 7 years for cases that were settled before trial and over 12 years for cases that went to trial. (See app. I, table I.1, for details.)

If no international treaty governed airlines' liability, many international airlines could be sued for full damages in U.S. courts. However, the compensation process under the domestic liability system has also been characterized by delays. According to the RAND Corporation data, Americans who pursued claims under the domestic liability system had to wait, on average, about 2 years to obtain compensation if they settled their cases before trial and at least 3 years once they went to trial. The maximum length of time for receiving compensation was almost 10 years for cases that were settled before trial and 12 years for cases that went to trial. (See app. I, table I.1, for details.)

Claimants' Costs of Securing Compensation Would Decrease Under Protocol No. 3

Under the Protocol and the supplemental compensation plan, claimants' costs of securing compensation in most cases would be lower than they are under current international agreements and lower than they would be if no international agreements were in effect. The costs for claimants would include (1) the surcharge paid on the ticket to cover the compensation plan (currently estimated by the drafters of the plan to be $3 for the proposed level of coverage) and (2) legal costs, should an attorney be retained.

Legal costs would be lower under Protocol No. 3 for three reasons. First, since claimants would not have to prove that the airline was negligent, claimants would not incur the financial costs involved in such civil litigation. Second, because of the settlement inducement provisions of the Protocol and the plan, most cases should be resolved without a trial for damages, again eliminating the attendant legal fees. Finally, even if cases go to trial, claimants would not have to pay for legal representation if the court found that the airline and the plan contractor did not offer reasonable and prompt settlements.

According to the RAND Corporation data, between 1970 and 1984, the fraction of total compensation that about 75 percent of Americans paid

[7]James S. Kakalik, Elizabeth M. King, Michael Traynor, Patricia A. Ebener, and Larry Picus, Costs and Compensation Paid in Aviation Accident Litigation, RAND Corporation, The Institute for Civil Justice (Santa Monica: 1988).

for legal costs ranged from 15 to 33 percent, with average legal costs decreasing between 1977 and 1982. Americans whose claims were subject to current international agreements paid, on average, about 22 to 28 percent of their compensation for legal costs, depending on whether they went to trial. The maximum legal costs were 40 percent of compensation. Americans whose claims were subject to the domestic liability system paid about the same—on average, 23 to 24 percent of their compensation and a maximum of 43 percent. (See app. I, table I.2, for details.)

Protocol No. 3 and the Supplemental Compensation Plan Would Increase the Level of Compensation

American victims of international aviation accidents and their families would be more fully compensated under Montreal Protocol No. 3 and the proposed supplemental compensation plan than they would be if current international agreements remained in effect or if no international agreements existed. Under the Protocol, the airlines would pay up to approximately $143,000 in compensation to victims—a significant increase over the current maximum of $75,000. Furthermore, the plan would pay claimants up to $500 million for all provable damages—an amount that exceeds by $100 million the highest damages ever paid for an airline disaster involving a single aircraft.[8] In addition, since the Protocol and the plan would reduce legal costs, claimants would be able to keep more of their compensation.

According to the RAND Corporation data, the average compensation increased between 1970 and 1984. However, U.S. courts compensated claimants for only 39 percent of the actual economic losses they suffered in aviation accidents, which averaged about $787,000 (in March 1986 dollars).[9] The uncertainty of the results of litigation was cited as one factor encouraging claimants to accept compensation that was less than the true value of their economic losses. The average compensation for economic losses in accidents governed by current international agreements was even lower—less than half that received by Americans whose claims were subject to the domestic liability system. (See app. I, table I.3, for details.)

[8]Japan Airlines and Boeing paid $400 million in total compensation for the 500 victims of a Boeing 747 crash in Japan. Northwest Airlines paid about $200 million in total compensation for an airplane crash in Detroit in 1987.

[9]Elizabeth M. King and James P. Smith, Economic Loss and Compensation in Aviation Accidents, RAND Corporation, The Institute for Civil Justice (Santa Monica: 1988). Losses were calculated under the "loss to survivors" principle. Under this principle, damages are awarded for the present value of probable contributions the deceased would have made to survivors had the individual lived. The study excludes non-economic losses from this calculation.

Protocol No. 3 Would Increase Americans' Access to U.S. Courts and Law in the Event of a Foreign Airline Accident

Under Protocol No. 3 and the supplemental compensation plan, if Americans are not satisfied with the compensation the airline and contractor of the plan offer, most would be able to gain access to U.S. courts and have their damage awards decided under U.S. law. Americans are usually compensated more fully when their suits for damages are tried in U.S. courts applying U.S. law because U.S. standards for determining compensation are higher than most foreign standards. Protocol No. 3 gives claimants the right to have their suits tried in the courts of the country in which victims reside if the airline has an establishment there.[10] In addition, the supplemental compensation plan guarantees all Americans access to U.S. courts and law if the claimant is not satisfied with the compensation the plan contractor offers.

Current international agreements limit jurisdiction over suits for damages to the place where the ticket was bought, the place of destination, the country of the airline, or the country where the airline has its principal place of business. Thus, under these agreements, Americans flying between two foreign countries on a foreign airline might be unable to secure U.S. jurisdiction.

If no international agreements existed, most Americans, but not all, would be able to gain access to U.S. courts and law because the basis of jurisdiction would depend on the laws of the country in which the suit was filed. However, even if a U.S. citizen obtained jurisdiction in a U.S. court, state rules governing choice of law might dictate that another country's laws be applied.[11]

[10]The term "establishment" has been equated with the term "place of business." Although this latter term has been variously interpreted by different courts, the general consensus has been that an airline's ticket office would constitute a "place of business" and would satisfy the requirements of Article 28 of the Warsaw Convention, as amended by Protocol No. 3.

[11]In deciding which laws to apply, the court must consider several factors, including the place where the injury occurred; the place where the conduct causing the injury occurred; the domicile, residence, nationality, place of incorporation, and place of business of the parties involved; and the place where the relationship, if any, between the parties is centered. If these factors predominate in a country other than the United States, then that country's domestic laws will be applied.

Implementation of Protocol No. 3 Is Unlikely to Adversely Affect Airline Safety

In removing the litigation of fault, Protocol No. 3 is unlikely to jeopardize airline safety because adverse economic impacts due to aviation accidents and government safety regulations are the primary incentives for airlines to operate safely.

Adverse economic impacts include lost revenues and lower stock prices. According to a recent study by the Center for Policy Studies at Clemson University, the price of an airline's stock drops significantly after a serious accident when initial investigations by safety officials indicate that the airline was at fault.[12] Clemson researchers traced the fall in the airline's stock price to investors' expectation that the airline's profits would decline because consumer demand would fall.

Government safety requirements, oversight, investigations, and sanctions also are major factors in promoting airline safety. Throughout the world, government agencies, such as the Federal Aviation Administration (FAA) and the National Transportation Safety Board, use a variety of means to ensure aviation safety. For example, FAA can amend, suspend, and revoke certificates; levy civil and criminal penalties; and seize aircraft to enforce its safety regulations.

According to the President's Commission on Aviation Security and Terrorism, the U.S. government should strengthen current regulatory enforcement mechanisms to ensure that airlines are accountable for safety violations, notwithstanding the powerful market forces that ought to deter unsafe or reckless conduct by the airlines.[13] We believe that the Commission is right to emphasize that government agencies be responsible for ensuring aviation safety. We also believe that victims of aviation accidents should not have to bear the costs of ensuring safety while trying to secure compensation.

Opponents of Protocol No. 3 have contended that removing the litigation of fault from the compensation process would reduce the financial incentive for airlines to operate safely. However, according to the RAND

[12]M.L. Mitchell and M.T. Maloney, "Crises in the Cockpit? The Role of Market Forces in Promoting Air Travel Safety," Journal of Law and Economics, Vol. 32 (Oct. 1989), pp. 329-355. Another study—Severin Borenstein and Martin B. Zimmerman, "Market Incentives for Safe Commercial Airline Operation," The American Economic Review, Vol. 78, No. 5 (Dec. 1988)—reached the same conclusion but found that the absolute value of such stock price declines is minimal in relation to the social costs of the accident and that consumer demand shows little or no decline.

[13]Report to the President by the President's Commission on Aviation Security and Terrorism (Washington, D.C.: May 15, 1990).

study, financial factors under the domestic liability system of compensation have not been sufficient to affect airlines' safety practices. Compensation paid by airlines is covered by liability insurance, the premiums for which represented only about 0.2 percent of airlines' operating revenues over a recent 10-year period.[14] In addition, short-term aviation insurance rates are determined to a greater extent by both the amount of funds available in the insurance market and the level of airlines' demand for insurance than by the safety record of individual airlines. Thus, any effect insurance rate increases might have on deterring unsafe practices does not appear to be significant.

Opponents have also suggested that eliminating the civil litigation of fault would remove a major mechanism—the discovery process—for the investigation and prevention of aviation accidents. However, government investigatory agencies uncover most of the same facts as the discovery process reveals. Moreover, government agencies make these facts public. Facts uncovered during civil litigation are not always made public because, as part of pretrial settlement agreements, the records are often sealed.

lternatives to rotocol No. 3 Offer ittle Advantage

If the United States does not ratify the Protocol and remains a party to current international agreements, these agreements will continue to impose a heavy burden on American claimants in terms of cost and time. Furthermore, if the Protocol goes into effect without the United States' participation, many Americans traveling on foreign airlines between countries that have ratified the Protocol would be subject to a liability limit that cannot be exceeded. In the absence of adequate foreign plans for supplemental compensation, this limit would usually result in considerably less compensation for American victims of an aviation accident.

Alternatively, if the United States withdraws from current international agreements altogether, some Americans flying on foreign airlines between two foreign countries might not secure full compensation because they might be unable to obtain jurisdiction in U.S. courts or to ensure the application of U.S. law. Even if Americans secured jurisdiction and the application of U.S. law, they might still be required to prove fault before they could litigate for damages. Proving fault can be a lengthy, difficult, and expensive process, particularly when the accident

[14]Sven Brise, Study on the Status and Future of the Warsaw System, International Chamber of Commerce (Geneva: 1988).

site is overseas or little evidence exists. In international aviation accidents that result from terrorist acts or unknown causes, proving an airline's fault may not be possible.

Conclusions

We believe that Protocol No. 3, in combination with an adequate supplemental compensation plan, offers a reasonable solution for Americans seeking full compensation for damages suffered in international air travel. The Protocol represents a marked improvement over the current international agreements that govern compensation to claimants and offers Americans traveling abroad a better chance of recovering damages. Together, the Protocol and the plan should provide a level of compensation to American claimants more consistent with that received domestically, but at less cost and without the years of delay that currently characterize the compensation process. Finally, the Protocol is unlikely to adversely affect the safety of international air travel.

To ensure the greatest possible benefit to American claimants, the U.S. supplemental compensation plan should cover all Americans engaged in international air travel. In doing so, the plan, together with the Protocol, would permit all Americans claiming damages for international aviation accidents to receive full and timely compensation.

Matters for Congressional Consideration

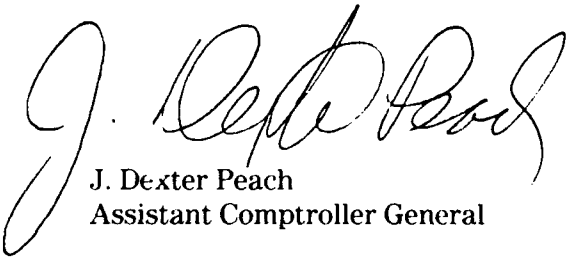
Because the current international agreements impose a heavy burden on American claimants trying to recover damages for international aviation accidents, the Senate may wish to ratify the Protocol with the proviso that the final version of the supplemental compensation plan conforms to DOT guidelines. These guidelines, among other things, stipulate that the plan should cover all Americans involved in international air transportation regardless of whether they paid the plan's surcharge or whether they are traveling between countries that have ratified Protocol No. 3.

In preparing this report, we reviewed pertinent laws and documents and analyzed statistical data on aviation accident litigation and compensation. We also interviewed officials of the Departments of State, Transportation, and Justice, as well as officials of organizations with interests in international aviation and aviation accident litigation. (See app. II for details on our objectives, scope, and methodology.) Our work was conducted between February and September 1990 in accordance with generally accepted government auditing standards.

As arranged with your office, unless you publicly announce its contents earlier, we plan no further distribution of this report until 30 days from the date of this letter. At that time we will send copies to the Secretaries of State and Transportation, the Attorney General of the United States, and other interested parties. We will also make copies available to others upon request.

This work was performed under the direction of Kenneth M. Mead, Director, Transportation Issues, (202) 275-1000. Other major contributors to this report are listed in appendix III.

Sincerely yours,



J. Dexter Peach
Assistant Comptroller General

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Abbreviations

DOT	Department of Transportation
FAA	Federal Aviation Administration
GAO	General Accounting Office
ICAO	International Civil Aviation Organization
RCED	Resources, Community, and Economic Development Division
SDR	Special Drawing Right

Data on the Timeliness of Compensation, Cost of Securing Compensation, and Level of Compensation Under Current International Agreements and the Domestic Liability System

This appendix presents aggregate data on the timeliness of compensation, cost of securing compensation, and level of compensation for Americans who made claims for people killed as a result of aviation accidents. Data are given for cases subject to current international agreements and to the domestic liability system, which most Americans could use if no international agreements governed airlines' liability. According to the RAND Corporation, compensation data for individual claimants vary widely, depending on the specific characteristics of the claim and other factors.

Table I.1: Time to Disposition of Claims per Death, for Major U.S. Aviation Accidents Between 1970 and 1984

	Time to disposition of claims by Americans (years)[a]			
	Current agreements		Domestic liability system	
Value	No trial (488 cases)	Trial (38 cases)	No trial (1,033 cases)	Trial (136 cases)
Maximum	6.8	12.3	9.8	12.0
Mean	1.8	7.4	1.9	3.2
Median	1.3	9.2	1.5	2.9

[a]The RAND Corporation defines the disposition date of a case as the date on which the last claimant signed a release or, if that date is missing, the date when the last check was issued (usually on or soon after the date the last release was signed).

Source: Kakalik et al., Costs and Compensation Paid in Aviation Accident Litigation (unpublished supplementary data).

Table I.2: Cost of Securing Compensation per Death, for Major U.S. Aviation Accidents Between 1970 and 1984

	Ratio of legal cost to compensation (percent)			
	Current agreements		Domestic liability system	
Value	No trial (197 cases)	Trial (24 cases)	No trial (484 cases)	Trial (60 cases)
Maximum	40	38	43	40
Mean	22	28	23	24
Median	21	29	25	25

Source: Kakalik et al., Costs and Compensation Paid in Aviation Accident Litigation (unpublished supplementary data).

Table I.3: Total Compensation Paid per Death, for Major U.S. Aviation Accidents Between 1970 and 1984

	Compensation (in 1986 dollars)[a]			
	Current agreements		Domestic liability system	
Value	No trial (488 cases)	Trial (38 cases)	No trial (1,033 cases)	Trial (136 cases)
Maximum	$1,932,835	$1,170,050	$5,699,301	$5,252,419
Mean	194,504	331,137	479,762	733,828
Median	123,382	238,327	326,000	454,270

[a]Compensation includes all contributions made by the airline, the aircraft manufacturer, the government, and any other defendants.

Source: Kakalik et al., Costs and Compensation Paid in Aviation Accident Litigation (unpublished supplementary data).

Objectives, Scope, and Methodology

On November 22, 1989, the Chairman of the Senate Committee on Foreign Relations asked us to examine how Montreal Aviation Protocol No. 3 and its companion supplemental compensation plan would affect the timeliness of compensation, the cost of securing compensation, and the level of compensation for American victims of international aviation accidents and whether the Protocol might affect the safety of international air travel. To address the Chairman's concerns, we agreed to compare how the liability system would work under three scenarios: if Protocol No. 3 were adopted, if the Protocol were rejected and current international agreements remained in effect, or if no international agreements existed.

To determine how the liability system would function if Protocol No. 3 were adopted, we analyzed the provisions of the treaty and the proposed supplemental compensation plan. We discussed the issue with government officials, as well as with officials of organizations with interests in international aviation and aviation accident litigation. At the Department of Transportation (DOT), we interviewed officials from the Office of the Assistant Secretary for Policy and International Affairs and the Office of the Assistant General Counsel for International Law. At the Department of State, we interviewed officials from the Office of Aviation Programs and Policy and the Legal Branch, both under the Economic Bureau. At the Department of Justice, we interviewed officials from the Civil Division. At the International Civil Aviation Organization (ICAO), we interviewed officials from the Legal Bureau. We also contacted executives of the aviation insurance industry, representatives of aviation industry trade and consumer groups, and attorneys who specialize in aviation accident litigation for both plaintiffs and defendants.

To determine how the liability system operates under current international agreements, we relied on data from the RAND Corporation's 1988 Aviation Accident Study—the most recent and comprehensive statistical study of aviation accident litigation. The study covered 25 major accidents that involved U.S. airlines between 1970 and 1984 and includes claims for damages subject to current international agreements and the domestic liability system. The data base contains detailed information on aviation accident litigation and compensation. We also analyzed data for more recent aviation accident death settlements compiled by DOT and the Air Transport Association of America, the domestic airlines' trade association. Because information pertaining to aviation accident settlements is sensitive, we were unable to independently verify these data. We also discussed the liability system under current international agreements with the individuals and officials mentioned above.

To determine how the liability system would function in the absence of international agreements, we again relied on data from the RAND study. Because most Americans could pursue their claims for damages under the domestic liability system if no international agreements governing airlines' liability existed, we used data for claims subject to the domestic system as an indication of the situation that would exist in the absence of international agreements. We again discussed this issue with government and private experts.

As requested by the Chairman's office, we did not obtain official agency comments on this report. We conducted our work between February and September 1990 in accordance with generally accepted government auditing standards.

Major Contributors to This Report

Resources, Community, and Economic Development Division, Washington, D.C.	Francis P. Mulvey, Assistant Director John V. Wells, Assignment Manager Juan F. Tapia-Videla, Evaluator-in-Charge Howard F. Veal, Staff Evaluator
Office of the General Counsel	David K. Hooper, Attorney-Adviser